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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Dmitri Vallerveich TATARINOV,

Petitioner,

vs.

Superior Court of the State of California,  
County of San Diego; Office of the Chief  
Counsel, Dept. of Homeland Security; U.S.  
Attorney, Southern District; ICE Detention &  
Removal Unit

Respondents.

) Civil No. 07cv2033-L(NLS)

) Civil No. 07cv2034-L(NLS)

) USICE No. A72 779 308

) **CONSOLIDATED PETITION**

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	)	USICE No. A72 779 308
vs.	)	
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County of San Diego; Office of the Chief	)	
Counsel, Dept. of Homeland Security; U.S.	)	
Attorney, Southern District; ICE Detention &	)	
Removal Unit	)	
Respondents.	)	

INTRODUCTION

Mr. Tatarinov moves to reinstate his post-conviction non-statutory motion to vacate a judgment entered after court trial on grounds of ineffective assistance of counsel, or vacate the verdict from the Superior Court of the State of California case number SCD 119330 on the grounds that he received ineffective assistance of counsel during the appeal phase of the trial rendering these critical stages constitutionally inadequate, in violation of the state and federal rights to the effective assistance of counsel and due process.

Mr. Tatarinov also moves to reinstate his post-conviction non-statutory motion to vacate a judgment entered after plea, or vacate the verdict from the Superior Court of the State of California case number SCD 135946 on the grounds that he received ineffective assistance counsel based on defense counsel's conflict of interest rendering these critical stages constitutionally inadequate, in violation of the state and federal rights to the effective

1 assistance of counsel, due process, and a fair trial.

2 The collateral consequences of both convictions are the deportation of Mr. Tatarinov  
3 and as such the cases and controversy still exist.

4 The Supreme Court has held that it possesses jurisdiction under 28 U.S.C. §2241 to  
5 grant on “original” writ of habeas corpus to state or federal prisoners in exceptional cases  
6 when there are procedural or jurisdictional obstacles under U.S.C. §2254 or 2255. Under 28  
7 U.S.C. §2255, “If the court finds that the judgment was rendered without jurisdiction, or that  
8 the sentence imposed was not authorized by law or otherwise open to collateral attack, or that  
9 there has been such a denial or infringement of the constitutional rights of the prisoner as to  
10 render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment  
11 aside and shall discharge the prisoner or resentence him or grant a new trial or correct the  
12 sentence as may appear appropriate.” Likewise under U.S.C. §2254, a petition may be filed  
13 on “behalf of a person in custody pursuant to the judgment of a State court only on the ground  
14 that he is in custody in violation of the Constitution or laws or treaties of the United States.”

15 Mr. Tatarinov has completed the California state sentencing imposed upon him by these  
16 convictions, but, because of the collateral consequences of deportation, he is being detained  
17 under Federal custody by Immigration Customs Enforcement. He respectfully moves that the  
18 court grant his U.S.C. §2241 writ and vacate the judgments based upon the violation of his  
19 constitutional rights.

### 20 JURISDICTION

21 The denial of effective assistance of counsel during the appeal phase of the trial  
22 is a violation of the U.S. Constitution. The Fourteenth Amendment guarantees a criminal  
23 defendant the right to counsel on his first appeal as of right. *Douglas v. California*, 372 U.S.  
24 353 (1963). Additionally, the guarantees of the Sixth Amendment entitle defendants in  
25 criminal cases the right to effective assistance of counsel, which includes the right to conflict-  
26 free representation. *United States v. Mett*, 65 F.3d 1531 (9<sup>th</sup> cir. 1995.)

27 A Federal court does not have subject matter jurisdiction over a habeas petition unless  
28 the petitioner is “in custody” within the meaning of 28 U.S.C. §2254(a). Although Mr.  
Tatarinov is no longer in state custody or state probation from this conviction, Mr. Tatarinov

1 is currently in custody by the Immigration and Customs Enforcement Detention and Removal  
2 Center located in San Diego, CA. Mr. Tatarinov was found removable as an alien convicted  
3 of a crime involving moral turpitude within five years of admission pursuant to section  
4 237(a)(2)(A)(i) of the Immigration and Nationality Act, as well as an alien convicted of two or  
5 more crimes involving moral turpitude from this conviction. Excerpts of Record, pp. 115-117.  
6 U.S.C. §2241(c)(1) allows the filing of a writ of habeas corpus to a prisoner if "he is in  
7 custody under or by color of the authority of the United States or is committed for trial before  
8 some court thereof;" In habeas corpus proceedings attacking a criminal conviction, the case  
9 or controversy requirement normally is satisfied, even after all potential custody has expired.  
10 Habeas jurisdiction is therefore proper.

### 11 MOOTNESS

12 Collateral consequences from a state judgment or order may used to establish that the  
13 case is not moot. *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). Such consequences include  
14 the "inability to vote, engage in certain businesses, hold public office, or serve as a juror."  
15 (*Id.* At 237-238). A conviction usable in a "persistent felony offender" prosecution is a  
16 collateral consequence that defeats any mootness objections when a habeas petitioner is no  
17 longer in custody. *Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985). Here, Mr. Tatarinov  
18 overcomes mootness because under California's "Three Strikes" law, Mr. Tatarinov's robbery  
19 conviction and 484/666 shop lifting conviction can be used to increase the punishment for  
20 subsequent felonies. Likewise, the conviction resulted in the serious collateral consequence of  
21 affecting his immigration status making him removable as an alien convicted of a crime  
22 involving moral turpitude within five years of admission pursuant to section 237(a)(2)(A)(i) of  
23 the Immigration and Nationality Act, as well as an alien convicted of two or more crimes  
24 involving moral turpitude. Excerpts of Record, pp. 115-117.

### 25 STATEMENT OF CASE #1 (SCD 119330)

26 Mr. Tatarinov was charged in the California Superior Court with one count of second  
27 degree robbery in violation of California Penal Code section 211, and one count of interfering  
28 with a police officer in violation of California Penal Code section 148. A jury convicted Mr.  
Tatarinov of robbery but acquitted him of violation section 148 in August 1996. The superior



1 court granted probation. Excerpts of Record, p. 77.

2 The California jury convicted Mr. Tatarinov of robbery on a theory that he shoplifted  
3 merchandise from a Nordstrom store, and then assaulted a store employee after being  
4 confronted in the parking lot. Excerpts of Record, p. 77. At trial, testimony presented by the  
5 prosecution and the defense provided conflicting descriptions of a fight that occurred between  
6 Mr. Tatarinov and store security agents in the parking lot. Nordstrom agents said they  
7 followed Mr. Tatarinov into the parking lot to question him about shoplifting and he assaulted  
8 them after being asked to return to the store. Conversely, Mr. Tatarinov testified that when he  
9 started to enter his car in the parking lot, a Nordstrom agent assaulted him without  
10 provocation. Trial counsel argued that Mr. Tatarinov did not commit robbery because he used  
11 force against the Nordstrom personnel not to avoid arrest, but as a lawful response to  
12 excessive force. Excerpts of Record, pp. 46-57, 77.

13 A basic issue at trial involved the difference between petty theft and robbery. The  
14 court gave the jury special instructions explaining the difference between those two offenses.  
15 However, the court's instructions effectively told the jury that Mr. Tatarinov had no right to  
16 use force against the Nordstrom security agents, even if they used unreasonable force to arrest  
17 him. Had Mr. Tatarinov's state appeal been heard on the merits, it is reasonably probable  
18 those instructions would have required reversal of the robbery conviction. A properly  
19 instructed jury would likely convict Mr. Tatarinov of misdemeanor theft, and not robbery.  
20 Excerpts of Record, pp. 46-57. Mr. Tatarinov was prejudiced by Attorney Verhovskoy's  
21 failure to act because Mr. Tatarinov had meritorious legal issues to present on appeal.  
22 Excerpts of Record, pp. 1-2, 6, 9-10, 46-57, 77-78.

23 Mr. Tatarinov filed a timely notice of appeal to the California Court of Appeal. The  
24 appeal was subsequently dismissed on April 28, 1997 after Mr. Tatarinov's retained attorney,  
25 Mr. Verhovskoy, (Verhovskoy), failed to file a written brief. Excerpts of Record, p. 10.  
26 Verhovskoy thereafter intentionally misled Mr. Tatarinov and his wife about the status of the  
27 appeal. Excerpts of Record, pp. 2-4, 6-7, 77-78. Finally, Mr. Tatarinov's wife learned  
28 through her own efforts that the appeal had been dismissed. Verhovskoy then filed an  
unsuccessful motion to reinstate the appeal. By then, more than two years had passed since

1 the appeal's dismissal. Excerpts of Record, pp. 3, 78.

2 In December 2000 Verhovskoy sent Mr. Tatarinov a letter terminating his  
3 representation. Excerpts of Record, pp. 4, 30, 78. The California State Bar subsequently  
4 suspended Verhovskoy and commenced disciplinary proceedings against him. Excerpts of  
5 Record, pp. 78, 131-134. During the summer of 2001, Mr. Tatarinov's wife spoke to an  
6 attorney who informed her that it might be possible to reinstate the California appeal. Excerpts  
7 of Record, p. 4. Mr. Tatarinov thereafter retained Attorney Jerome P. Wallingford. On  
8 August 20, 2001, Attorney Wallingford filed a "Motion to Recall Remittitur, Vacate  
9 Dismissal and Reinstate Appeal." The California Court of Appeal denied the motion in an  
10 order dated September 20, 2001. Excerpts of Record, p. 34. Mr. Tatarinov then filed a  
11 timely petition for review in the California Supreme Court. It was considered as case  
12 S101020 and denied December 21, 2001. Excerpts of Record, p. 36.

13 On February 15, 2002, Mr. Tatarinov filed a petition for writ of habeas corpus in the  
14 California Court of Appeal. The Attorney General filed an informal response pursuant to an  
15 order by the Court of Appeal. On June 25, 2002, the Court of Appeal filed its order denying  
16 the petition. Excerpts of Record, p. 38. Only July 3, 2002, Mr. Tatarinov filed a timely  
17 petition for review in the California Supreme Court from denial of the petition for writ of  
18 habeas corpus. It was considered as case S108092 and denied August 28, 2002. Excerpts of  
Record, p. 40.

19 Having exhausted his state court remedies, Mr. Tatarinov filed a petition for writ of  
20 habeas corpus in the United States District Court on October 11, 2002. Excerpts of Record, p.  
21 42. The State of California filed a motion to dismiss the habeas petition, alleging a violation  
22 of the one-year AEDPA statute of limitations. After reviewing briefs filed by the parties,  
23 United States Magistrate Judge Roger Benitez issued a Report and Recommendation on April  
24 2, 2003, recommending that the District Court grant Respondent's motion to dismiss the  
25 habeas petition as time-barred. Mr. Tatarinov filed timely objections to the Report. Excerpts  
26 of Record, pp. 59-74, 78. On June 16, 2003, District Judge Thomas J. Whelan filed an order  
27 adopting the Report and Recommendation. A final judgment was filed that same date.  
28 Excerpts of Record, pp. 76, 88.

1 Mr. Tatarinov filed a timely notice and appeal and requested a certificate of  
2 appealability on July 11, 2003. Excerpts of Record, pp. 90, 94. The District Court thereafter  
3 denied a certificate of appealability on July 30, 2003. On October 23, 2003, the United States  
4 Court of Appeal Ninth District filed an order granting a certificate of appealability with  
5 respect to whether the district court properly denied appellant's federal habeas corpus petition  
6 as untimely. Excerpts of Record, p. 95. On August 11, 2004, the United States Court of  
7 Appeals for the Ninth Circuit held that the 2002 petition was untimely. Excerpts of Record,  
8 pp. 96-98. On August 25, 2004, Mr. Tatarinov filed a Petition for Rehearing. Excerpts of  
9 Record, pp. 99-105. On September 28, 2004, the United States Court of Appeals for the  
10 Ninth Circuit denied the Petition for Rehearing. Excerpts of Record, p.106.

11 Having exhausted his state and federal court remedies to reinstate his appeal, Mr.  
12 Tatarinov filed a post-conviction non-statutory motion to vacate a judgment entered after  
13 court trial on grounds of ineffective assistance of counsel on October 23, 2006 in the Superior  
14 Court of California, County of San Diego. Excerpts of Record, pp. 107-126. The Honorable  
15 Judge Jeffrey F. Fraser denied the non-statutory motion ruling that the trial court lacked  
16 jurisdiction to vacate the judgment. On November 2, 2006, a notice of appeal was filed with  
17 Court of Appeal - State of California. Excerpts of Record, p. 127. On June 1, 2007 the appeal  
18 was dismissed after Respondent's motion to dismiss based on lack of jurisdiction. Excerpts  
19 of Record, p. 136. On June 12, 2007 a Petition for Review was filed in the Supreme Court of  
20 California. On September 12, 2007 the petition for review was denied. Excerpts of Record,  
p. 137

#### 21 STATEMENT OF CASE #2 (SCD 135946)

22 On October 19, 1998 Mr. Tatarinov pled guilty to shop lifting. The charge was  
23 upgraded to a felony due to the prior robbery conviction (SCD 119330) and he was charged  
24 under California Penal Code Section 484/666. Mr. Tatarinov was sentenced to 34 days of  
25 custody, imposition of the sentence was suspended and he was placed on probation for five  
26 years. Attorney Verhovskoy (Verhovskoy) represented Mr. Tatarinov again and advised Mr.  
Tatarinov to plead guilty.

27 On October 23, 2006 Defendant filed a non-statutory motion to vacate a plea entered  
28

1 on grounds of ineffective assistance of counsel in the Superior Court of California, County of  
2 San Diego. Excerpts of Record, pp. 107-126. The Honorable Judge Jeffrey F. Fraser denied  
3 the motion ruling that the trial court lacked jurisdiction to vacate the judgment. On November  
4 2, 2006, a notice of appeal was filed with Court of Appeal - State of California. Excerpts of  
5 Record, p. 127. On June 1, 2007 the appeal was dismissed after Respondent's motion to  
6 dismiss based on lack of jurisdiction. Excerpts of Record, p. 136. On June 12, 2007 a  
7 Petition for Review was filed in the Supreme Court of California. On September 12, 2007 the  
8 petition for review was denied. Excerpts of Record, p. 137.

#### 9 STATEMENT OF FACTS

10 The California Superior Court placed Mr. Tatarinov on probation for robbery.  
11 Verhovskoy filed a timely notice of appeal and notified the Court of Appeal he would  
12 represent petitioner. Excerpts of Record, p. 10. Subsequently, the Court of Appeal issued a  
13 notice advising Verhovskoy the appeal would be dismissed if he failed to file the opening  
14 brief within 30 days. On April 28, 1997, the court dismissed the appeal. The docket shows  
15 that on September 10, 1997, a dismissal order mailed to petitioner was returned, marked  
16 "unable to forward." Excerpts of Record, p. 10.

17 Two years later, Verhovskoy filed a "Motion to Set Aside Dismissal and Reinstate  
18 Appeal." Excerpts of Record, pp. 11, 14-22. Verhovskoy asserted, in conclusory terms, the  
19 "default was solely the result of counsel's inadvertence, surprise, and/or neglect, and said  
20 dismissal was entered through no fault of appellant." Excerpts of Record, pp. 15, 21.  
21 Verhovskoy's declaration said he failed to file the opening brief "due to financial and medical  
22 catastrophes." Excerpts of Record, p. 22. The motion did not explain the two-year delay.  
23 Excerpts of Record, pp. 14-22. The Court of Appeal denied the motion summarily by an  
24 order dated September 24, 1999. Excerpts of Record, p. 24.

25 Verhovskoy represented petitioner on other matters during 1996 through December 24,  
26 2000. In 1996, 1997 and 1998, petitioner and his wife frequently asked Verhovskoy about  
27 status of the appeal from the robbery conviction. Verhovskoy misled them by making  
28 statements like, "appeals can take years," "the appeals court must believe we have some merit  
to the case as they have not responded," "I will call and check on the status," and "the court is

1 still looking at the matter.” Excerpts of Record, pp. 2-4, 6-7.

2 During the summer of 1998, Mr. Tatarinov’s wife called the court in an effort to obtain  
3 status on the appeal. She was informed there was no active appeal from case SCD119330.  
4 She immediately called Verhovskoy. He admitted that was true. She asked him to explain the  
5 problem to her husband. Mr. Tatarinov’s wife does not speak Russian, and she knew it would  
6 be difficult to explain the situation to her husband. Verhovskoy waited months before telling  
7 Mr. Tatarinov. Then, in September 1999, after much prodding, Verhovskoy unsuccessfully  
8 filed the “Motion to Set Aside Dismissal and Reinstate Appeal.” Excerpts of Record, pp. 3,  
9 11, 14, 24. After that motion was denied, Verhovskoy led Mr. Tatarinov and his wife to  
10 believe nothing could be done to revive the case. Verhovskoy recommended a motion asking  
11 the Superior Court to expunge the conviction. Excerpts of Record, pp. 3-4, 26-27.

12 Verhovskoy thereafter continued to represent Mr. Tatarinov in this matter in Superior  
13 Court. During April 2000, he filed a motion in the Superior Court to terminate probation.  
14 The Superior Court denied the motion and denied a spontaneous motion for expungement.  
15 Excerpts of Record, p. 26. In October 2000, Verhovskoy filed a second motion seeking  
16 termination of probation. The Superior Court denied it on November 3, 2000. The minute  
17 order says Mr. Tatarinov is “to remain at liberty on probation.” Probation in case SCD119330  
18 terminated on October 18, 2002. Excerpts of Record, pp. 27-28.

19 In December 2000, Verhovskoy continued to represent Mr. Tatarinov on an  
20 immigration matter. Verhovskoy had recently asked for a payment of \$500, which was  
21 promptly paid. On December 24, 2000, Mr. Tatarinov received a letter from Verhovskoy. It  
22 stated Verhovskoy would no longer represent Mr. Tatarinov, and advised him to retain other  
23 counsel. The letter provided no explanation. Excerpts of Record, pp. 4, 30. On January 19,  
24 2001, Mr. Tatarinov received a notice from the California State Bar indicating Verhovskoy  
25 was “suspended from the practice of law in the State of California for a period of sixty (60)  
26 days.” Mr. Tatarinov retained another attorney to represent him in the immigration matter.  
27 Excerpts of Record, pp. 4, 115.

28 On January 28, 2000, Mr. Tatarinov filed a Complaint Form with The State Bar of  
California regarding Verhovskoy’s failure to file the appeal and nonperformance in other legal

1 matters. Excerpts of Record, pp. 128-130. The State Bar of California assigned case number  
2 01-O-00503 and the disciplinary case settled on September 30, 2002. By failing to prepare and  
3 file appellate briefs and not notifying Mr. Tatarinov of his actions, Verhovskoy was found to  
4 have failed "to perform legal services with competence, in violation of Rules of Professional  
5 Conduct, Rule 3-110(A)." Excerpts of Record, pp. 131-134

6 During the summer of 2001, Mr. Tatarinov's wife spoke to an attorney who said it  
7 might be possible to reinstate the appeal. Mr. Tatarinov thereafter retained Attorney Jerome  
8 P. Wallingford, who proceeded to exhaust available state and federal court remedies.  
9 Excerpts of Record, pp. 4, 78.

10 On January 6, 1995, Mr. Tatarinov was granted Conditional Permanent Resident  
11 Status based upon his marriage. In December 1996, he filed a petition to remove that status.  
12 That application was not adjudicated until several years later. In fact, it was not until Mr.  
13 Tatarinov was in Removal Proceedings that the Immigration and Naturalization Service  
14 decided to remove the condition, making him a Lawful Permanent Resident. As a result of his  
15 convictions, Mr. Tatarinov was placed in removal proceedings on June 24, 1998. The  
16 Immigration Judge found him removable as an alien convicted of a crime involving moral  
17 turpitude within five years of admission pursuant to section 237(a)(2)(A)(i) of the  
18 Immigration and Nationality Act, as well as an alien convicted of two or more crimes  
19 involving moral turpitude. Excerpts of Record, pp. 115-117.

#### 20 ARGUMENTS

- 21 1. Attorney's misconduct in permitting defendant's state appeal to be dismissed, in lying  
22 about the status of the dismissed appeal, and representing that nothing could be done  
23 to revive the appeal, requires a finding of counsel's failure to act competently resulting  
24 in ineffective assistance of counsel violating the Due Process Clause of the Fourteenth  
25 Amendment

26 *Douglas v. California*, 372 U.S. 353 (1963), held that the Fourteenth Amendment  
27 guarantees a criminal defendant the right to counsel on his first appeal as of right. The U.S.  
28 Supreme Court later held "The Due Process Clause of the Fourteenth Amendment guarantees  
a criminal defendant the effective assistance of counsel on his first appeal as of right." *Evitts*



1 v. *Lucey*, 469 U.S. 387 (1985) posed a factual situation similar to Mr. Tatarinov's case. The  
2 retained counsel filed a timely notice of appeal to the Court of Appeals of Kentucky but  
3 counsel then failed to file a statement of appeal when he filed his brief and the record on  
4 appeal. The Commonwealth filed a motion to dismiss the appeal for failure to file a statement  
5 of appeal and the Kentucky Court of Appeals granted the dismissal motion. For the next  
6 "seven years respondent unsuccessfully pursued every avenue open to him in an effort to  
7 obtain a decision on the merits of his appeal and to prove that his conviction was unlawful."  
8 *Evitts* held that "Nominal representation on an appeal as of right - like nominal representation  
9 at trial - does not suffice to render the proceedings constitutionally adequate; a party whose  
10 counsel is unable to provide effective representation is no better position than one who has no  
11 counsel at all. A first appeal as of right therefore is not adjudicated in accord with due process  
12 of law if the appellant does not have the effective assistance of an attorney." Although Mr.  
13 Tatarinov retained Verhovskoy to perfect his appeal, Verhovskoy's failure to file the appellate  
14 brief resulted in ineffective representation and no counsel at all. Similarly, in *Anders v.*  
15 *California*, 386 U.S. 738 (1967), counsel's failure to submit a brief on appeal, and in  
16 *Entsminger v. Iowa*, 386 U.S. 748 (1967), counsel's waiver of the petitioner's right to a full  
17 transcript, rendered the subsequent judgments against the petitioners unconstitutional.

18 Mr. Tatarinov retained Verhovskoy to file his appeal. Verhovskoy failed to file the  
19 appellate brief causing the dismissal of the appeal and misled Mr. Tatarinov for several years  
20 regarding the status of the appeal. After Mr. Tatarinov learned that the appeal had been  
21 dismissed, Verhovskoy continued to lie, deceive and provide misinformation to Mr. Tatarinov  
22 hiding the fact he had acted incompetently. Verhovskoy's failure to file a brief resulted in the  
23 dismissal of Mr. Tatarinov's appeal, violating the Fourteenth Amendment Due Process clause  
24 guaranteeing that Mr. Tatarinov have effective assistance of counsel on his first appeal as of  
25 right and as such, the judgment against Mr. Tatarinov should be rendered unconstitutional.

26 II. Attorney's misconduct in permitting defendant's state appeal to be dismissed, in lying  
27 about the status of the dismissed appeal, failure to file a "Wende brief" to protect  
28 defendant's rights, and representing that nothing could be done to revive the appeal,  
requires a finding of counsel's failure to act competently resulting in ineffective

1 assistance of counsel violating the Sixth Amendment guarantee that a defendant has  
2 the assistance necessary to justify reliance on the outcome of the proceeding. A  
3 showing of prejudice is presumed where counsel failed to file an appeal after  
4 consulting defendant and defendant instructed counsel to file the appeal.

5 Verhovskoy failed to honor Mr. Tatarinov's request to file an appeal by not submitting  
6 the brief. *Rodriguez v. U.S.*, 395 U.S. 327 (1969), held that a lawyer who disregards a  
7 defendant's specific instructions to file a notice of appeal acts in a professionally unreasonable  
8 manner and "those whose right to appeal has been frustrated should be treated exactly like any  
9 other appellants; they should not be given an additional hurdle to clear just because their  
10 rights were violated at some earlier stage in the proceedings. Accordingly, we hold that the  
11 courts below erred in rejecting petitioner's application for relief because of his failure to  
12 specify the points he would raise were his right to appeal reinstated." The petitioner in the  
13 *Rodriguez* case was of "Mexican descent and that his knowledge of the English language was  
14 limited. He further contended that his retained counsel had fraudulently deprived him of his  
15 right to appeal." In Mr. Tatarinov's case, we have a Russian immigrant who specifically  
16 retained a Russian-speaking lawyer as Mr. Tatarinov's knowledge of the English language  
17 was limited. Although Verhovskoy filed the notice of appeal, he did not file the brief, failing  
18 to perfect an appeal on behalf of Mr. Tatarinov. This failure to perfect the appeal and lying to  
19 Mr. Tatarinov regarding the appeal "fraudulently deprived" Mr. Tatarinov of his appeal.

20 Following the *Rodriguez* ruling, *Strickland v. Washington*, 466 U.S. 668 (1984)  
21 provided a framework for evaluating counsel's performance. Under *Strickland* "The Sixth  
22 Amendment right to counsel is the right to the effective assistance of counsel, and the  
23 benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so  
24 undermined the proper functioning of the adversarial process that the trial cannot be relied on  
25 as having produced a just result." Verhovskoy's conduct of failing to prepare and file the  
26 appellate brief was of such deficient performance that Mr. Tatarinov was denied his right of  
27 appeal. "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive  
28 denial of the assistance of counsel altogether is legally presumed to result in prejudice."  
*Strickland v. Washington*, 466 U.S. 668 (1984). "The complete denial of counsel during a



critical stage of a judicial proceeding, however, mandates a presumption of prejudice because “the adversary process itself” has been rendered “presumptively unreliable.”<sup>”</sup> *United States v. Cronin*, 466 U.S. 648, 659 (1984). The failure by Verhovskoy to file the appellate brief was a “complete denial of counsel during a critical stage of a judicial proceeding” violating Mr. Tatarinov’s rights under the Sixth Amendment.

Under *Roe v. Flores-Ortega*, 120 S.Ct. 1029, 1038, (2000) “where an attorney fails to file an appeal, and the petitioner can prove that he would have appealed “but for” counsel’s failure to file, prejudice is presumed.” See also *Rodriquez v. U.S.*, 395 U.S. 327 (1969); *Peguro v. U.S.*, 119 S.Ct. 961,965 (1999) (discussing *Rodriquez*); *Lozada v. Deeds*, 498 U.S. 430, 432 (1991) (per curiam); and *Manning v. Foster* (9<sup>th</sup> Cir. 2000) 224 F3d 1129, 1135-1136, prejudice presumed where defense counsel (i) failed to file appeal after defendant’s specific request to do so. Mr. Tatarinov timely instructed Verhovskoy of his desire to appeal in person, by telephone, and by remitting payment for the appeal. Verhovskoy acknowledged Mr. Tatarinov’s timely direction to appeal in person, by telephone, by invoice and to the California State Bar Investigative Unit. Thus Mr. Tatarinov has demonstrated that, “but for his attorney’s errors, he would have appealed his sentence.” Mr. Tatarinov has shown “prejudice” and requests a reversal of his conviction based on Verhovskoy’s ineffective assistance at a crucial phase of the adversarial process which violated Mr. Tatarinov’s rights under the Sixth Amendment.

III. Attorney’s conduct resulted in an irreconcilable conflict of interest between him and his client violating the Sixth Amendment right to conflict-free representation.

The guarantees of the Sixth Amendment entitle defendants in criminal cases the right to effective assistance of counsel, which includes the right to conflict-free representation. *United States v. Mett*, 65 F.3d 1531 (9<sup>th</sup> cir. 1995.) “Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.” *Wood v. Georgia*, 450 U.S. 262,271 (1981). “The defense counsel had a duty to alert the court to the existence of conflicts and to assist the court in determining whether the conflict has been properly waived, if a waiver exists.” *People v. Mroczko*, 35 C3d 86 (1983).

1 The possibility of a conflict of interest is insufficient to impugn a criminal conviction.  
2 In order to establish a violation of the Sixth Amendment, a defendant must show that an  
3 actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan*, 446  
4 U.S. 335 (1980).

5 Verhovskoy had a duty to inform the court of the prior trial, SCD 119330, his failure  
6 to file the appellate brief and his deceit regarding the appeal. Verhovskoy was aware that his  
7 representation in the prior case was incompetent. "In criminal cases, an attorney's  
8 representation of a former client may preclude renewed representation of that client in a new  
9 matter if the prior representation resulted in the client's conviction. Reason: The client may  
10 want to attack the prior conviction on the ground of incompetent representation." (*People v.*  
11 *Bailey*, (1992) 9 CA4th 1252, 1254-1255, 12CR2d 339, 340-341 – permitting trial counsel to  
12 represent same client on appeal puts the counsel in "the untenable position of urging his own  
13 incompetency"; San Diego Bar Ass'n Form. Opn. 1995-1-lawyer representing a former client  
14 on new matter involving "three strikes" violation must decline representation if prior  
15 representation deemed inadequate.) California Practice Guide Professional Responsibility  
16 2005, 6-142 [6:900].

17 Verhovskoy's continued representation of Mr. Tatarinov after failing to file the SCD  
18 119330 appellate brief is an "actual" conflict. The instant Verhovskoy failed to file the  
19 appellate brief per Mr. Tatarinov's request, April 28, 1997, Verhovskoy created an actual  
20 conflict between him and Mr. Tatarinov. Verhovskoy hid the fact he failed to file the  
21 appellate brief by lying to Mr. Tatarinov about the status of the appeal. From April 1997  
22 through December 2000 Verhovskoy kept Mr. Tatarinov as a paying client by lies and  
23 misrepresentations. It was only after the California State Bar, on another matter, suspended  
24 his license that Verhovskoy was forced to terminate the relationship. "An attorney has an  
25 actual, as opposed to a potential, conflict of interest when, during the course of the  
26 representation, the attorney's and the defendant's interests diverge with respect to a material  
27 factual or legal issue or to a course of action." *United States v. Levy*, 25 F3d 146 (2d Cir.  
28 1994.) There is a "presumption of prejudice where conflict is actual." California Practice  
Guide Professional Responsibility 2005, 6-138 [6:846]. "An actual conflict of interest on the

1 part of defense counsel can constitute ineffective assistance of counsel and mandate reversal  
2 of a criminal conviction or sentence.” California Practice Guide Professional Responsibility  
3 2005, 6-133 [6:820].

4 IV. Attorney’s misconduct in permitting defendant’s state appeal in Case #1 to be  
5 dismissed, in lying about the status of the dismissed appeal, and representing that  
6 nothing could be done to revive the appeal, requires a finding of counsel’s conflict of  
7 interest resulting in ineffective assistance of counsel violating the Due Process Clause  
8 of the Fourteenth Amendment.

9 Mr. Tatarinov retained Verhovskoy to file his appeal in Case #1. Verhovskoy failed to  
10 file the appellate brief causing the dismissal of the appeal and misled Mr. Tatarinov for  
11 several years regarding the status of the appeal. After Mr. Tatarinov learned that the appeal  
12 had been dismissed, Verhovskoy continued to lie, deceive and provide misinformation to Mr.  
13 Tatarinov hiding the fact he had acted incompetently. Verhovskoy’s failure to file a brief  
14 resulted in the dismissal of Mr. Tatarinov’s appeal, violating the Fourteenth Amendment Due  
15 Process clause guaranteeing that Mr. Tatarinov have effective assistance of counsel on his first  
16 appeal as of right and as such, created an actual conflict between Mr. Tatarinov and  
17 Verhovskoy violating his right in Case #2 to conflict free representation.

18 V. Attorney’s misconduct in permitting defendant’s state appeal in Case #1 to be  
19 dismissed, in lying about the status of the dismissed appeal, failure to file a “Wende  
20 brief” to protect defendant’s rights, and representing that nothing could be done to  
21 revive the appeal, requires a finding of counsel’s conflict of interest resulting in  
22 ineffective assistance of counsel violating the Sixth Amendment guarantee that a  
23 defendant has the assistance necessary to justify reliance on the outcome of the  
24 proceeding.

25 Verhovskoy failed to honor Mr. Tatarinov’s request to file an appeal by not submitting  
26 the brief. Although Verhovskoy filed the notice of appeal, he did not file the brief, failing to  
27 perfect an appeal on behalf of Mr. Tatarinov. This failure to perfect the appeal and lying to  
28 Mr. Tatarinov regarding the appeal “fraudulently deprived” Mr. Tatarinov of his appeal  
creating an actual conflict of interest which deprived Mr. Tatarinov of conflict free

1 representation.

2 Following the *Rodriguez* ruling, *Strickland v. Washington*, 466 U.S. 668 (1984)  
3 provided a framework for evaluating counsel's performance. Under *Strickland* "The Sixth  
4 Amendment right to counsel is the right to the effective assistance of counsel, and the  
5 benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so  
6 undermined the proper functioning of the adversarial process that the trial cannot be relied on  
7 as having produced a just result." Verhovskoy's conduct of failing to prepare and file the  
8 appellate brief in Case #1, and lying to the Defendant was of such deficient performance that  
9 Mr. Tatarinov was denied his right to conflict free representation. "In certain Sixth  
10 Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance  
11 of counsel altogether is legally presumed to result in prejudice." *Strickland v. Washington*,  
12 466 U.S. 668 (1984). "The complete denial of counsel during a critical stage of a judicial  
13 proceeding, however, mandates a presumption of prejudice because "the adversary process  
14 itself" has been rendered "presumptively unreliable." *United States v. Cronin*, 466 U.S. 648,  
15 659 (1984).

16 VI. The non-statutory motions to vacate were made on grounds that could not have been  
17 raised on direct appeal from the judgment themselves and are not duplicate appeals  
18 from the judgments.

19 Under California law, a defendant may appeal from an order made after judgment,  
20 affecting the substantial rights of the defendant. Penal Code §1237 (a) &( b). An appeal from  
21 a post-judgment motion to vacate a guilty plea based on a claim of ineffective assistance of  
22 counsel will be appealable since the basis for the claim is generally not contained in the record  
23 and could not have been raised on direct appeal. This is the "silent record exception" - an  
24 appeal is allowed where the record on appeal from the judgment would not have shown the  
25 error sought to be asserted. Penal Code §1237 allows an appeal where the record on appeal  
26 from the judgment would not have shown the claim of ineffective assistance of counsel and  
27 extra-record evidence of counsel's performance is presented in the motion to vacate. *People*  
28 *v. Gallardo* 77 Cal.App.4th 971, 981 (2000).

The denial of a non-statutory motion to vacate is appealable where the basis of the

1 motion raises matters outside the records of the case. *People v. Thomas* (1959) 52 Cal.2d 521.  
2 “Thomas was appealing from a non-statutory post-judgment motion to vacate. “Because the  
3 grounds supporting a non-statutory motion are not specifically defined, the “no second  
4 appeal” rule serves as a procedural device to discourage defendants from raising any post-  
5 judgment claim that could have been raised before imposition of judgment or by way of direct  
6 appeal from the original judgment.” (*People v. Banks*, 53 Cal.2d at p 380.)” *People v.*  
7 *Totari* (2002) 28 Cal.4th 876. Appellant’s claim on ineffective assistance of counsel could  
8 not have been raised before imposition of judgment or by way of direct appeal from the  
9 original judgment. Petitioner’s original appellate attorney’s ineffective assistance of counsel  
10 happened during the appeal phase of the proceedings.

11 Verhovskoy’s failure to submit a brief for the direct appeal constitutes ineffective  
12 assistance of counsel. *Rodriguez v. U.S.*, 395 U.S. 327 (1969), “a lawyer who disregards a  
13 defendant’s specific instructions to file a notice of appeal acts in a professionally unreasonable  
14 manner.” Verhovskoy’s conflict of interest constitutes a claim of ineffective assistance of  
15 counsel which could not have been raised before imposition of judgment or by way of direct  
16 appeal from the original judgment.

17 As a result of his conviction Mr. Tatarinov was found to be removable as an alien  
18 convicted of a crime of moral turpitude and is deportable. As such, the ruling denying a non-  
19 statutory motion to vacate judgment would qualify based upon the violation of Mr.  
20 Tatarinov’s Sixth and Fourteenth Amendment rights by the actions of Verhovskoy as an order  
21 after judgment affecting Mr. Tatarinov’s substantial rights and is therefore appealable.

22 The Court of Appeal - State of California, Fourth Appellate District, Division One  
23 granted Respondent’s motion to dismiss. The Respondent’s motion stated that the “trial court  
24 lacked jurisdiction,” and therefore the appeal was from an “unappealable order.” In *People v*  
25 *Banks*, (1959) 53 Cal.2d 370, the court exercised its inherent power to accept an appeal from  
26 an apparently unappealable order denying a post-judgment motion to vacate a guilty plea  
27 because the defendant raised an important constitutional question of first impression.

28 For every constitutional violation there must be a remedy. “Fundamental  
jurisdictional defects, like constitutional defects, do not become irremediable when a

1 judgment of conviction becomes final without appeal (or even after affirmance on appeal).”  
2 *Mooney v. Holohan* (1935), 294 US 103. California courts must entertain non-statutory  
3 motions to invalidate particular stages of a criminal case, even entire criminal convictions, on  
4 constitutional grounds. This rule – that constitutional violations must find a remedy even if  
5 no statute provides one – has been specifically applied to claims of ineffective counsel.  
6 *Murguia v. Municipal Court* 15 Cal.3d 286, 124 (1975); *People v. Fosselman* 33 Cal.3d 572,  
7 189 (1983). The court therefore has inherent authority to grant a post-judgment non-statutory  
8 motion to vacate a judgment when the constitutional rights of the accused have been violated.

9 VII. The non-statutory motions to vacate were timely filed as the substantial rights of the  
10 defendant are adversely affected by the immigration proceedings defendant is facing.

11 California Penal Code Section 1237, provides that a defendant may appeal from “a  
12 final judgment of conviction (§1237, subd. (a)) or from ”any order made after judgment,  
13 affecting the substantial rights of the party” (§1237, subd. (b)). This permits an appeal from  
14 any post judgment order that affects the “substantial rights” of the defendant, the right to  
15 appeal is limited by the qualification that, ordinarily, no appeal lies from an order denying a  
16 motion to vacate a judgment of conviction on a ground which could have been reviewed on  
17 appeal from the judgment.” Mr. Tatarinov’s non-statutory motion to vacate brought in the  
18 San Diego Superior Court is based on ineffective assistance of counsel and does not address  
19 grounds that would have been reviewed on appeal.

20 There is no time limit in which the California Penal Code Section 1237 motion may be  
21 made. Mr. Tatarinov has been in Removal Proceedings with the Immigration and  
22 Naturalization Service proceedings since June 24, 1998. On February 9, 2007 the United  
23 States Court of Appeals denied his Petition and he was ordered to surrender to the nearest  
24 Immigration and Customs Enforcement, Detention and Removal Office by March 6, 2007.  
25 Mr. Tatarinov is currently in custody with Immigration Customs Enforcement awaiting  
26 deportation stemming from the conviction in this case. “[A] motion is timely if brought  
27 within a reasonable time after the conviction actually ‘may have’ such consequences.” *People*  
28 *v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183. Therefore, the post-conviction non-  
statutory motion to vacate a judgment entered after court trial on grounds of ineffective

1 assistance of counsel was timely as the actual collateral consequences of his conviction are  
2 now being realized.

3 CONCLUSION

4 The consequences of Mr. Tatarinov's failure to receive competent representation are a  
5 reversal of the convictions and for this reason, Mr. Tatarinov respectfully petitions this Court  
6 to grant his petitions under 28 U.S.C. §2241 to vacate the judgments entered on grounds of  
7 ineffective assistance of counsel resulting in violations of Mr. Tatarinov's rights under the  
8 Sixth and Fourteenth Amendments.

9  
10 Respectfully submitted,

11  
12 s/Patricia Lynn Jacks  
13 Patricia Lynn Jacks  
14 Attorney for Petitioner  
15 pjacks@san.rr.com  
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Certificate of Compliance Pursuant to Fed. R. App. P.  
32(a)(7)(C) and Circuit Rule 32-1 for  
DMITRI VALLERVEICH TATARINOV, Petitioner

The consolidated petition is proportionately spaced, has a typeface of 12 points or more and contains 7,547 words.

s/Patricia Lynn Jacks  
PATRICIA LYNN JACKS  
Attorney for Petitioner



United States District Court  
For the Southern District of California

Dmitri Vallerveich TATARJNOV, ) Civil No. 07cv2033-L(NLS)  
 ) Civil No. 07cv2034-L(NLS)

Petitioner, )

USICE No. A72 779 308

vs. )

Superior Court of the State of California, )  
County of San Diego; Office of the Chief )  
Counsel, Dept. of Homeland Security; U.S. )  
Attorney, Southern District; ICE Detention & )  
Removal Unit )

**CONSOLIDATED PETITION**

Respondents.

I, the undersigned declare under penalty of perjury that I am over the age of eighteen years and not a party to this action; that I served the above-named person the following documents:

**CONSOLIDATED PETITION**

in the following manner:

**Mailing Information for a Case 3:07-cv-02033-L-NLS**

**Electronic Mail Notice List**

The following are those who are currently on the list to receive e-mail notices for this case.

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**Manual Notice List**

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing).

- (No manual recipients)

Executed on **November 29, 2007**, at San Diego, California.

s/Patricia Lynn Jacks  
PATRICIA LYNN JACKS  
Attorney for Petitioner